Parts Depot, Inc. and Unite Here, CLC.[1] Cases 12–CA–16449 and 12–CA–6741.

September 15, 2006

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 29, 2000, the Board issued a Decision and Order finding that, in relevant part, the Respondent unlawfully laid off several of its warehouse employees including, but not limited to, Enrique Flores, Isabel Martinez, Aundria McGregor, Angela Wilson, and Altonia Wright,[2] and ordering the Respondent to reinstate the employees and make them whole for any loss of earnings and benefits resulting from their layoff.[3] On February 13, 2001, the Board's Order was enforced by the United States Court of Appeals for the District of Columbia Circuit.[4]

On October 30, 2003, the Regional Director issued a compliance specification setting forth the amount of backpay due the claimants. The Respondent filed an answer on January 6, 2004, and an amended answer on March 31, 2004.[5]

A hearing on the issue of backpay was held on June 14–17, 2004, before Administrative Law Judge Ira Sandron. On November 10, 2004, he issued the attached supplemental decision, ordering backpay for the claimants after finding that the Respondent had not met its burden of establishing that Martinez, McGregor, Wilson, and Wright had failed to mitigate damages by making reasonable searches for interim employment. Finding that Flores' whereabouts were unknown, as was any information pertaining to his interim earnings, the judge ordered Flores' gross backpay be placed in escrow for a period not to exceed 1 year. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs. The Respondent also filed a reply brief.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[6] findings,[7] and conclusions as modified herein.

[1] We have amended the caption to reflect the merger of the Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC (UNITE!) with the Hotel Employees and Restaurant Employees International Union, AFL–CIO, CLC (HERE), effective July 8, 2004, and the disaffiliation of UNITE HERE from the AFL–CIO effective September 14, 2005.

[2] Nine other employees entered into a settlement agreement prior to the hearing.

[3] 332 NLRB 670 (2000).

[4] 24 Fed. Appx. 1 (D.C. Cir. 2001).

[5] Prior to the compliance hearing, the General Counsel amended the compliance specification, reducing the total sum owed by the Respondent by more than $50,000. The Respondent moved to amend its answer at the start of the hearing, which the judge subsequently denied. While the hearing was underway, the General Counsel amended the compliance specification, once again, increasing the sum totals relating to McGregor and Wright by $826.52 and $1,529.94, respectively (net backpay plus Respondent's matching 7.65 percent FICA contribution), based on information belatedly received from the Social Security Administration (SSA) and the Florida State Department of Revenue.

[6] The Respondent excepts to several of the judge's evidentiary and procedural rulings including: (1) denying its motion to amend its answer because the hearing had commenced; (2) not allowing it to subpoena certain records from the backpay claimants and the Immigration and Naturalization Service and not requiring the General Counsel to seek enforcement of those subpoenas; (3) precluding its expert witness, Dr. John M. Williams, from opining that, based on his analysis of employment trends and his review of job advertisements, the claimants did not make reasonable efforts to secure interim employment during the backpay period; and (4) limiting its examination of the claimants and the compliance officer. After a careful review of the record, we are of the opinion that the Respondent failed to show that the judge's rulings resulted in prejudice or a denial of due process.

Contrary to the dissent, we reject the Respondent's contention that the judge erred by precluding it from eliciting testimony from Williams' that, based on his review of employment trends and job advertisements, the backpay claimants did not exercise reasonable diligence in seeking work. Here, we find that the Respondent's attempt to equate the claimants' lack of success with a lack of trying is a "bootstrap argument" that runs counter to Board and court precedent. *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991) (citations omitted). It is well established that the respondent's burden is not met by presenting evidence of a lack of employee success in getting interim employment or low interim earnings. Rather, the respondent must affirmatively demonstrate that the claimant neglected to make a reasonable effort to find interim work. Id. (Quotations omitted.)

In accordance with the foregoing principle, the Board, on numerous occasions, has refused to rely on expert testimony, similar to that offered here, where the expert is only "referring to the probability of job opportunities, not to a given individual's situation" and he "forms his opinions" about the claimant without having any personal knowledge of the latter's particular circumstances. *United States Can Co.*, 328 NLRB 334, 343 (1999), enfd. 254 F.3d 626 (7th Cir. 2001). See also *Midwestern Personnel Services*, 346 NLRB No. 58, slip op. at 2–3 (2006); *Taylor Machine Products*, 338 NLRB 831, 831–832 (2003), enfd. 98 Fed. Appx. 424 (6th Cir. 2004); *Arthur Young & Co.*, 304 NLRB 178, 179 (1991); *Food & Commercial Workers Local 1357*, supra, 301 NLRB at 621–622. Applying well-established Board precedent, we find that the judge properly precluded Williams' testimony as to his opinion of the adequacy of the claimants' job search. Contrary to the assertion in the dissent, the judge did allow this witness to present evidence relevant to the context of the claimants' job searches, including unemployment rates, market trends and conditions, job ads in a local newspaper and information from a state job service. In reaching this finding, we disavow the judge's conclusion that expert testimony can only be rebutted by another expert.

Unlike the dissent, we also reject the Respondent's contention that the judge abused his discretion by limiting the Respondent's examination of the claimants and the compliance officer. The Board's Rules provide, in pertinent part, that a judge should "regulate the course of the

I. ANALYSIS

Our objective in compliance proceedings is to restore, to the extent feasible, the status quo ante by restoring the circumstances that would have existed had there been no unfair labor practices. *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998) (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)), enf. granted in part 231 F.3d 1156 (9th Cir. 2000). Because determining what would have happened absent the unfair labor practice is often problematical, the General Counsel is allowed wide discretion in choosing a formula for computing backpay. *Alaska Pulp*, supra, 326 NLRB at 523. It is the General Counsel's burden to establish gross backpay amounts that are reasonable, not arbitrary. *Performance Friction Corp.*, 335 NLRB 1117 (2001). The burden then shifts to the Respondent to establish affirmative defenses to mitigate its backpay liability, including willful loss of earnings. *Atlantic Limousine, Inc.*, 328 NLRB 257, 258 (1999), enfd. 243 F.3d 711 (3d Cir. 2001).

For the reasons stated by the judge, we reject the Respondent's contention that it met its burden of proving that Martinez, McGregor, Wilson, and Wright failed to mitigate backpay damages.[8]

The General Counsel and the Respondent have a dispute as to the backpay totals owed by the Respondent for Martinez, McGregor, Wilson, and Wright. As discussed below,[9] we have modified the backpay calculations as to each of these discriminatees.

A. Isabel Martinez

The judge awarded backpay to Martinez in the amount of $72,664.40.[10] He modified Martinez' backpay award after finding that she had worked on a cash basis at Night and Day Laundry from approximately August 1994 until October 1995, and that the amended compliance specification did not account for those interim earnings.

At the hearing, Martinez testified that she reported all her interim earnings to the Board. When she was questioned about her job application with AIB Financial Group, which listed her prior employment with the laundry, she responded that she had made up the job to increase her chances of obtaining employment and a mortgage. While the judge found that Martinez was otherwise credible, he discredited her denial that she had worked at the laundry. He found that she had in fact worked there and that the amount she earned there ($8,775) should be deducted as interim earnings from her backpay.[11]

Contrary to the judge, we find that Martinez should be denied gross backpay for each quarter she concealed her employment with the laundry. In *American Navigation Co.*, 268 NLRB 426, 428–429 (1983), the Board denied backpay for the quarters a backpay claimant willfully concealed interim earnings.[12] See also *Victor's Cafe 52*,

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hearing" and "take any other action necessary." Board's Rules and Regulations Sec. 102.35. Thus, the Board accords judges significant discretion in controlling the hearing and directing the creation of the record. See generally, *Victor's Café 52, Inc.*, 338 NLRB 753, 756–757 (2002); *F. W. Woolworth Co.*, 251 NLRB 1111 fn. 1 (1980), enfd. 655 F.2d 151 (8th Cir. 1981), cert. denied 455 U.S. 989 (1982). Here, the Respondent remained free to question both the backpay claimants concerning their searches for work, the actual employment obtained, and their interim earnings, and the compliance officer concerning the amended compliance specification and any alleged inconsistencies therein. Given the lengthy backpay period, and the claimants' search-for-work forms, we find that the Respondent was properly precluded from burdening the record with cumulative and superfluous questions or from asking questions which amounted to nothing more than a fishing expedition. In these circumstances, we find that the judge acted within his broad discretion when he balanced burdensomeness against probity and imposed a reasonable limitation on the Respondent's ability to cross-examine claimants.

[7] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also contends that the judge improperly credited one part, but discredited another part, of Martinez' testimony. We disagree. "[N]othing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951)

[8] We also reject the Respondent's contention that the method used by the Region to compute the interim earnings was inherently flawed. See NLRB Casehandling Manual (Part Three) Compliance Sec. 10550.2 (instructing that earnings that have been documented on an annual basis must be allocated to the calendar quarter). Thus, in situations like here, where employment dates and quarterly earnings cannot be confirmed with employers, or it is impractical, a reasonable allocation may be made on the basis of approximate employment dates provided by the claimant. Accord: *Brown Co.*, 305 NLRB 62, 73 (1991).

[9] We agree with the General Counsel that the judge inadvertently miscalculated the sum total owed by the Respondent with respect to Wright. The judge ordered the Respondent to pay $30,198.55, i.e., $28,052.53 in net backpay and $2,146.02 in matching FICA. In doing so, he overlooked having granted the General Counsel's motion to amend the compliance specification to allege an additional $1,529.94, i.e., $1,4212.22 in net backpay and $108.72 in matching FICA, making the sum total now owed by the Respondent $31,728.49. We will modify the judge's recommended supplemental Order accordingly.

[10] The amended compliance specification alleged that the Respondent owed the sum total of $81,439.40 with respect to Martinez, i.e., $75,652.02 in net backpay and $5,787.38 in matching FICA.

[11] The judge arrived at this figure by using Martinez' stated starting salary of $120 per week at the laundry and her stated ending salary of $150 per week to arrive at an average salary of $135 a week, which he then multiplied by 65 weeks. The General Counsel contends that the judge erred when he calculated the amount of interim earnings at the laundry to be deducted from Martinez' backpay award. Given our disposition of this issue, we find it unnecessary to pass on this contention.

[12] In *American Navigation*, the claimant concealed 4 weeks of interim employment in connection with the compliance procedure. The

Inc., 338 NLRB 753, 755–756 (2002). Applying American Navigation, we find it appropriate here to deny Martinez all backpay for the six quarters in question (during which she worked at the laundry) and to reduce her backpay award by $17,500.12 (the compliance specification has initially deducted $1848 in interim earnings reported for this period).[13] Accordingly, we find that the sum total owed is $62,600.52.[14]

B. Aundria McGregor

The judge awarded backpay to McGregor in the amount of $42,172.71.[15] The judge deducted $5655 from the sum total the Respondent owed because McGregor abandoned his employment with Fine Distributing in 1999. We affirm the judge.

McGregor worked for Fine Distributing three times. The first time he was laid off. He was rehired a few months later, but he resigned when the company relocated from Miami to Broward County. McGregor testified that due to lack of transportation at that time, the relocated worksite proved to be too far away for him to be able to continue employment. Approximately 3 years later, during the second quarter of 1999, he was reemployed at Fine Distributing and worked at the Broward County site for a brief period. He testified that he quit because Fine Distributing was "located in Broward County and it was hard trying to get there with the vehicle [he] had at the time."

When a backpay claimant quits interim employment, "the burden shifts from the Respondent to the Government to show that the decision to quit was reasonable." *Minette Mills, Inc.*, 316 NLRB 1009, 1010 (1995). We agree with the judge that the General Counsel established that McGregor's first resignation from Fine Distributing was reasonable because it was the result of the immediate transportation difficulties caused by the company's relocation to Broward County. See *Sorenson Lighted Controls*, 297 NLRB 282, 283 (1983) (noting that the Board has held that "a discriminatee who loses interim employment owing to a lack of transportation beyond that person's control has not engaged in a willful loss of employment").

However, when McGregor later returned to work at Fine Distributing in 1999, he was well aware of the transportation difficulties and the distance involved, and apparently had initially arranged transportation. Under these circumstances, the General Counsel had the affirmative burden to establish that McGregor's second resignation from Fine Distributing was reasonable.[16] However, the only justification given for his second resignation was that it was hard to get to Broward County with the vehicle he had at the time. This testimony fails to clarify whether McGregor was forced to quit for reasons beyond his control or merely chose to terminate his employment by his own choice. Accordingly, we find that the General Counsel has failed to prove that McGregor's resignation from Fine Distributing in 1999 was reasonable. Cf. *Sorenson Light Controls*, supra (backpay claimant incurred a willful loss of earnings when she decided to not rely on her brother-in-law for a ride to work). Accordingly, we find that a deduction of $5,655 from McGregor's net backpay is proper.[17] Add-

judge was unable to determine with any certainty whether the concealed employment occurred within the third quarter, the fourth quarter, or both, of the year at issue. The Board denied backpay for both quarters. 268 NLRB at 428.

[13] Chairman Battista observes that, under extant law, the Board withholds backpay from claimants who willfully conceal interim employment for the quarters in which they engaged in the concealed employment. *American Navigation Co.*, 268 NLRB 426, 427 (1983). Although the Respondent did not urge the Board to apply the *American Navigation* doctrine, Chairman Battista finds it appropriate to do so for institutional purposes. Chairman Battista also notes that no party urged the Board to adopt a rule that withholds all backpay from a claimant who has concealed any interim employment.

[14] We reach this figure by subtracting $17,500.12, Martinez' net backpay for these six quarters as alleged in the General Counsel's calculations, from $75,652.02, the total amount of Martinez' net backpay as alleged in these calculations, to arrive at the modified net backpay amount of $58,151.90, which with the matching FICA amount of $4,448.62, equals $62,600.52, the sum total the Respondent now owes.

[15] The first amended compliance specification alleged that the Respondent owed the sum total of $47,827.71 with respect to McGregor. During the hearing, however, the judge granted the General Counsel's motion to amend the compliance specification to allege an additional $826.52, i.e., $767.78 in net backpay and $58.74 in Respondent's matching FICA, making the sum total owed $48,654.23. We agree with the General Counsel that the judge inadvertently failed to include the amount specified in the motion made during the hearing, and we will modify the judge's recommended supplemental Order accordingly so as to include the $826.52 amount.

[16] Like the judge, we reject the Respondent's contention that McGregor's resignations from Florida Smoked Fish, Jamo, and Carnival Fruit were unreasonable. McGregor was not required to accept jobs posing increased exposure to environmental hazards or more onerous conditions in the first place. See, e.g., *Chem Fab Corp.*, 275 NLRB 21, 24 (1985), enfd. 774 F.2d 1169 (8th Cir. 1985). The judge did not address the reasonableness of McGregor's resignation from South East Frozen Foods. McGregor took a bus to that job. When his start time was changed to 2 a.m., no buses were available. See *International Trailer Co.*, 150 NLRB 1205, 1220 (1965). Under the circumstances, we find his resignation from that job was also reasonable.

[17] The judge inaccurately deducted $5,655 from the sum total as set forth in the first amended compliance specification, i.e., $47,827.71, including the Respondent's matching FICA, and not from McGregor's net backpay of $44,428.90. When $5,655 is properly deducted from McGregor's net backpay, the modified net backpay owed is $38,773.90, and the modified matching FICA is $2,966.20, for a total of $41,740.10. Adding the $826.52 mistakenly omitted by the judge, the Respondent owes a sum total of $42,566.62, i.e., $39,541.68 in net backpay and $3,024.94 in matching FICA.

ing the $826.52 mistakenly omitted by the judge, we find that sum total owed by the Respondent is $42,566.62.

C. Angela Wilson

The judge adopted the Region's calculation that the Respondent owes $51,563.18 in net backpay and matching FICA with respect to Wilson. The Respondent contends that this figure does not accurately reflect Wilson's 1998 interim earnings from Image Embroidery. We agree. It appears that the compliance officer based Wilson's 1998 interim earnings from Image Embroidery on the Social Security Administration's figure of $134.38. However, Wilson's 1998 W-2 Form and tax return state that she earned $5872. Apparently using the lower figure of $134.38, the compliance officer calculated that Wilson had aggregate interim earnings of $1,398.02 each quarter in 1998,[18] for a total of $5,592.08. Thus, the amended compliance specification does not reflect the additional $5,737.62 in interim earnings from Image Embroidery that year as reflected on Wilson's 1998 W-2 Form and her tax return. Adding $5,737.62 to Wilson's other 1998 interim earnings, her net interim earnings per quarter should be $2,832.43, for a total of $11,329.72, not $5,592.08. Deducting Wilson's 1998 net interim earnings of $11,329.72 from her 1998 gross backpay of $14,516.88, her net backpay should be reduced by $3,187.16, modifying the net backpay owed to $44,711.75. With the matching FICA amount of $3,420.45, we find that the Respondent owes a sum total of $48,132.20.

ORDER

The National Labor Relations Board adopts the recommended supplemental Order of the administrative law judge as modified herein and orders that Parts Depot, Inc., Miami, Florida, its officers, agents, successors, and assigns shall satisfy the obligation to make whole the following discriminatees by paying them the amounts following their names, together with interest thereon accrued to the date of payment computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax and withholdings required by Federal and State laws.

DISCRIMINATEE	*NET BACKPAY*	*FICA MATCH*	*SUM TOTAL*
Isabel Martinez	$58,151.90	$4,448.62	$62,600.52
Aundria McGregor	39,541.68	3,024.94	42,566.62
Angela Wilson	44,711.75	3,420.45	48,132.20
Altonia Wright	29,473.75	2,254.74	31,728.49
TOTAL	$171,879.08	$13,184.75	$185,027.83

IT IS FURTHER ORDERED that the determination of the backpay due Enrique Flores shall be severed.[19]

Dated, Washington, D.C. September 15, 2006

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Robert J. Battista, Chairman

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Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

In a backpay proceeding, an employer may mitigate its liability by showing that a claimant did not make "a reasonably diligent effort to obtain substantially equivalent employment." *Glenn's Trucking*, 344 NLRB No. 41 (2005). This is an affirmative defense, and the burden is on the employer to introduce record evidence to establish it. Id. This must be done at the hearing, because there is no provision for discovery in Board proceedings. Accordingly, due process requires that the administrative law judge charged with the responsibility for conducting the hearing afford an employer reasonable leeway to introduce evidence and examine and cross-examine witnesses concerning, inter alia, the claimants' efforts to mitigate their losses.

The administrative law judge's restrictive evidentiary rulings in this case unfairly limited the Respondent's ability to meet its evidentiary burden. The judge refused to allow the Respondent's expert witness to testify concerning matters within the scope of his expertise, including whether, based on his analysis of employment trends and available jobs, the claimants' efforts to obtain interim employment were reasonable. According to the judge, the evidence would be entitled to little weight. I disagree. Evidence of the economic conditions in which

[18] The judge found that Wilson has interim earnings from a number of interim employers besides Image Embroidery during these calendar quarters.

[19] By today's decision, we resolve backpay for all the backpay claimants except Flores whose whereabouts are presently unknown. Chairman Battista and Member Schaumber find that Flores' backpay raises significant issues of law and policy. Those issues include the question of which party has the burden of proof concerning whether a discriminatee has reasonably searched for work during the backpay period. In these circumstances, an order will be entered only as to four of the claimants, with the backpay issues relating to Flores to be severed and resolved as soon as possible. In Member Liebman's view, Flores' gross backpay and the Respondent's matching FICA were appropriately determined under extant law, and should be placed in escrow. See *Starlite Cutting, Inc.*, 284 NLRB 620 (1987).

a job search occurred provides useful context for an evaluation of a claimants' efforts.[1] In any event, the judge's assessment of the proper weight to be given to proffered evidence is no justification for excluding it.

The judge also unfairly limited the Respondent's cross-examination of the claimants and the Board's Compliance Officer concerning the contents of each claimant's compliance form. For example, the judge asked claimant Angela Wilson whether the information on her form was accurate. After she said that it was, the judge precluded the Respondent from testing this general averment by asking specific questions about the various job searches claimed on the form. The judge similarly accepted as conclusive the Compliance Officer's general testimony that she followed the compliance manual procedures, and refused to allow the Respondent to test this averment by posing specific questions about her communications with individual claimants.

It is entirely possible that the Respondent would not have adduced sufficient evidence in support of its position even if the judge permitted a full examination. In this regard, there is no evidence in the record to suggest that the Compliance Officer withheld pertinent information or acted improperly in any way. But the Respondent had the right to a full opportunity to make its record, and to be afforded reasonable leeway in the manner in which it did so. Because the judge's rulings deprived the Respondent of these rights, I would remand this case and instruct the judge to reopen the record and allow the Respondent to fully explore the reasonableness of the claimants' job search efforts.

Dated, Washington, D.C., September 15, 2006

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Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

Rafael Aybar and Chris Zerby, Esqs., for the General Counsel.
Charles S. Caulkins, Esq. (Fisher & Phillips, LLP), of Fort Lauderdale, Florida, for the Respondent.
Arcine Rasberry, for the Charging Party.

SUPPLEMENTAL DECISION AND ORDER

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises out of a compliance specification and notice of hearing issued by the Regional Director for Region 12 on October 30, 2003, against Parts Depot, Inc. (the Respondent), stemming from the Board's Decision and Order in 332 NLRB 64 (2000), enforced in full by the United States Court of Appeals for the District of Columbia Circuit in *Parts Depot, Inc. v. NLRB*, No. 00-1456 (D.C. Cir. Feb. 21, 2002). The Board found that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act by laying off a number of employees without providing notice to, and bargaining with, the Charging Party, the employees' collective-bargaining representative.

An amended compliance specification was issued on May 28, 2004.[1] Prior to the hearing, nine of the unlawfully terminated employees entered into a settlement agreement with the Respondent.[2] The instant matter therefore involves only the five remaining laid-off employees (the claimants): Enrique Flores, Isabel Martinez, Aundria McGregor, Angela Wilson, and Altonia Wright. For all of them but Wilson, the backpay period runs from August 10, 1994, when they were laid off, until April 4, 2003, when the Respondent made offers of reinstatement; for Wilson, the backpay period, as determined by the Region and uncontested by the Respondent, extends from August 10, 1994, until May 13, 2003.

Pursuant to the notice, I conducted a trial in Miami, Florida, on June 14–17, 2004, at which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

With the exception of Flores, all of the claimants testified. Additionally, the General Counsel called Karen Marksteiner, the Region 12 compliance officer, regarding preparation of the compliance specification and its methodology. The Respondent called Phil Friedli, Part Depot's general manager of Florida operations, respecting offers of reinstatement made to laid-off employees; and Dr. John Williams, an expert witness in vocational rehabilitation, concerning the overall job market during the backpay period for workers possessing similar skills as the claimants.[3]

The General Counsel and the Respondent filed helpful posthearing briefs that I have duly considered.

Legal Parameters

The applicable legal principles in this area are well established. As noted previously, the Board determined that the Respondent

[1] See *NLRB v. Seligman & Associates, Inc.*, 808 F.2d 1155, 1165 (6th Cir. 1986) ("The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual's background and experience and the relevant job market.")

[1] GC Exh. 1(o).

[2] See Jt. Exhs. 1 & 2.

[3] I did not permit Dr. Williams to render his (expert) opinion on whether the claimants made reasonable efforts to seek and secure employment during the backpay period, based on his analysis of employment trends and review of advertisements for jobs. Such testimony, by a stipulated expert, would have been impossible to rebut except by the testimony of another expert. This aside, Dr. Williams would not have been in a position to know all of the many particular facts surrounding each claimant's search for work. Nor could he have known what the specific job requirements were for advertised positions, how many of those positions were actually filled, or the qualifications of those who were hired vis-à-vis the claimants. The Board has consistently held that evidence about broad market trends and general economic conditions carries little weight in analyzing whether a particular claimant made reasonable efforts to mitigate. See, e.g., *American Armored Car*, 342 NLRB 528 (2004); *XCEL Energy*, 2002 WL 31662291 (2002); *Airport Services Lines*, 231 NLRB 1272, 1273 (1977).

unlawfully terminated the claimants. An unfair labor practice finding of this nature is presumptive proof that some backpay is owed. *Intermountain Rural Electrical Assn.*, 317 NLRB 588 (1995); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). This presumption carries throughout the assessment of backpay.

When an employer unlawfully discriminates or otherwise commits an unfair labor practice against an employee, the latter is entitled to compensation. Unlike the remedies following an action in tort, the goal of the remedial action in Federal labor law is to make whole those injured by restoring them to the condition they would have enjoyed absent the wrongful act. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953). Accordingly, the goal in compliance cases is to restore the backpay claimants, to the extent possible, to the status quo ante. *Manhattan Eye, Ear & Throat Hospital*, 300 NLRB 20 (1990). That is, the objective is to set current that which would have existed had there been no unfair labor practice. *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998), citing *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

A burden-shifting approach exists when computing backpay. First, the General Counsel must attempt to objectively reconstruct backpay amounts as accurately as possible and to show the gross amount of backpay due to each claimant. *J. H. Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 230–231 (5th Cir. 1973), cert. denied 414 U.S. 822 (1973). As a practical matter, it is almost impossible to conclude with certainty the precise amount individual claimants would have made had they continued working for a respondent during the backpay period. As a result, the General Counsel "is allowed a wide discretion in picking a formula"[4] for the computation of backpay. *Performance Friction Corp.*, 335 NLRB 1117 (2001), citing *Hill Transportation Co.*, 102 NLRB 1015, 1020 (1953). While the General Counsel cannot rely on an arbitrary approximation, it need use only a reasonable methodology in computing backpay. *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 544 (1984); *Performance Friction Corp.*, supra at 1118; *Atlantic Limousine*, 328 NLRB 257, 258 (1999); *Hacienda Hotel & Casino*, 279 NLRB 601, 603 (1986).

Once the General Counsel has established gross backpay, the burden shifts to a respondent to establish such matters as unavailability of jobs, willful loss of earnings, interim earnings to be deducted from the backpay award, and any other factor that will eliminate or mitigate its liability. *Atlantic Limousine*, supra at 258; *Hacienda Hotel & Casino*, supra at 603; *NLRB v. Mooney Aircraft*, 366 F.2d 809, 812–813 (5th Cir. 1966). Any doubt as to the amount of backpay owed is resolved in the claimant's favor and against the respondent, who is responsible for the unfair labor practice that has led to the backpay calculation itself. *Alaska Pulp Corp.*, supra at 522; *United Aircraft Corp.*, 204 NLRB 1068 (1973). An opposite presumption would be tantamount to punishing the claimant for being the victim of the employer's illegal actions.

Issue

The Respondent contends that the four claimants who testified failed to make reasonable efforts to secure and retain interim employment and, therefore, failed to mitigate the backpay amounts owed to them.

Facts

Based on the entire record, including the Board's Decision and Order, as affirmed; testimony of witnesses and my observations of their demeanor; documents; and stipulations of the parties, I make the following findings of fact.

A. Enrique Flores

Flores never contacted either the Region or the Respondent after his layoff in 1994. Compliance Officer Marksteiner attempted without success to reach Flores through a variety of sources. She testified that the Region contacted individuals who might have knowledge of his whereabouts, the Social Security Administration, other complainants in the case, and the Charging Party. Additionally, the Region provided the Respondent with the names and last known addresses of all 14 illegally terminated employees, including Flores, so that the Respondent could attempt to locate them.

Friedli testified that management contacted Part Depot's human resources department and a warehouse supervisor who was present during the 1994 layoff in an attempt to locate Flores. These efforts were similarly unsuccessful.

Therefore, Flores' whereabouts are unknown at this time, as is any information pertaining to his interim earnings, if any.

B. Isabel Martinez

Throughout the period of backpay, from 1994 through 2003, Martinez completed work and interim earnings reports (reports) and submitted them to the Region.[5] Often, these submissions came from the original handwritten notes she had made in conjunction with her job search. I find these reports an acceptable record of Martinez' job search efforts and reject the Respondent's suggestion that they are inherently suspect and untrustworthy because the original notes were not produced.

These records reflect that Martinez worked for several employers during the backpay period. In 1995 and 1996, for example, Martinez was employed by Japanese Restaurant Shima, Inc., as a temporary replacement for an ill coworker. Following this, from approximately August 1996 through mid-2001, Martinez worked for AIB Financial Group. Martinez was laid off when this company experienced significant downsizing. Thereafter, from mid-2001 until the end of the backpay period, Martinez continuously attempted to find employment through constant job searches, as documented in the job search forms she submitted to the Region.

One aspect of Martinez' work history is troubling and must be addressed. This concerns her relationship with a company known as Night and Day Laundry (the laundry). In response to the Respondent's subpoena duces tecum, Martinez submitted a job application that indicated she worked for the laundry as a manager from August 1994 through October 1995.[6] The information in the job application about the laundry job was detailed, setting forth her position, duties, salary, and supervisor.

[4] *Alaska Pulp Corp.*, 326 NLRB at 523.

[5] *Alaska Pulp Corp.*, 326 NLRB at 523.

[6] R. Exh. 15.

At trial, Martinez testified somewhat evasively that she illegally listed this business as a fictional employment reference in order to qualify for a loan, but if this was the reason, it does not explain why the job was listed in a job application. She was also equivocal in answering who actually filled out that application; she or her daughter. Martinez asserted that she did not work at the laundry from August 1994 through October 1995, and there are no W-2's in the record showing any such employment. However, under-the-table employment is not an unheard of phenomenon. During the period in question, August 1994 through October 1995, Martinez also detailed 55 separate job searches in the reports she filed with the Region,[7] suggesting she actively sought employment but not necessarily inconsistent with holding an unreported job at the laundry.

C. Aundria McGregor

McGregor regularly provided the Region with documentation of his job search efforts, interim earnings, and interim employment history.

Through the aid of an employment agency, McGregor first secured work with Florida Smoked Fish. However, he later resigned because, as he testified, the job required him to "work[] with water and . . . with fish and [to] constantly be[] in the water,"[8] causing him concerns for his health and safety.

Thereafter, McGregor continued to find employment through the same temporary employment agency. He next worked with Fine Distributing, Inc., where he was a warehouse selector for approximately 8 months. Following a layoff at Fine Distributing, McGregor searched for numerous other jobs and applied to several, including Eli Witt.

McGregor returned to Fine Distributing for some time but quit when the company's relocation resulted in a considerably longer commute. McGregor next worked for South East Frozen Foods for 3 months, ultimately quitting due to lack of transportation to and from work. McGregor subsequently secured employment with Jamo, Inc., where he was employed as a cement worker for 10 months. Due to health concerns—specifically the inhalation of cancer-causing chemicals, fear of exposing these materials to his children, and the inability to remove them from his clothes—McGregor quit this job.

Throughout this entire period, McGregor was registered with and received temporary employment through various employment agencies. McGregor also held two more steady jobs, at Carnival Fruit Company and again at Fine Distributing, before finding his most recent job. McGregor quit Carnival Fruit because "we were working at zero temperature and I was coming out constantly with colds."[9] He also quit working for Fine Distributing a second time due to transportation issues, which had prompted his previous resignation from that company.

Since on or about January 4, 2000, through the end of his backpay period, McGregor has worked as a custodian for the Dade County School Board. In addition, he has sought and maintained other temporary jobs.

D. Angela Wilson

Throughout the backpay period, Wilson applied for and held a number of positions, as documented in the reports she filed with the Region.[10] For example, from August 1994 through February 1995, she applied to as many as 39 separate employers.

Additionally, beginning in 1995, Wilson was consistently employed throughout the remainder of the backpay period. During the early months of 1995, Wilson worked for Ogden, Floramor USA, Burger King, and Dry Clean USA. Starting in March 1995, Wilson worked primarily for one employer (Ogden) at the University of Miami, where she was a housekeeper. In this function, Wilson worked an overnight shift. During this period, she also worked a night shift for Burger King.

By 1996, Wilson was working for Marise Laundry for approximately 6 hours during the day and also on the night shift at the University of Miami for Ogden. She testified that the strain of two jobs eventually proved too much for her and, as a result, she stopped her employment with Marise Laundry.

In 1997, Wilson worked for Goodwill Industries, Italian Baci Da Milano, and Color It, Inc. Due to layoffs and difficulty in obtaining transportation, Wilson left these jobs for other employment. By 1998, Wilson was employed by Floramor, Staff Link Outsourcing, Elite Embroidery, Image Embroidery, Staffing Concepts, and Color It.

In 1999, Wilson applied to and worked for Atlantic Bouquet Company, Image Embroidery, and Staffing Concepts. She also held three jobs in 2000, during which time she was employed by GP Plastics, Flexible Business Systems d/b/a M & M Plastics, and Staffing Concepts. Wilson began working at M & M Plastics in early 2000 and continued to be employed by that company through the end of her backpay period. Although Wilson worked the night shift at M & M Plastics and several of her other jobs during the interim period, she testified that she did so because the day shifts she desired were unavailable.

E. Altonia Wright

Unlike the other claimants, Wright did not submit reports to the Region during the backpay period. However, she testified that she regularly searched for employment. From August 1994 through December 1995, she searched for full-time employment with approximately 100 different employers, although she found only part-time work during this period. Wright attempted to generate income by working as much as possible, including at jobs that were less than ideal, since they were part-time positions that offered no chance for full-time employment.[11]

In 1994, Wright obtained employment through Regency Staffing Payroll, Inc., a temporary employment agency. Through this company, Wright began working for ABC, a warehouse facility, where she was employed for 2 months but not offered full-time employment. In 1995, Wright worked for the United States Postal Service (USPS), which paid more than the job at ABC, but she was laid off after her temporary em-

[7] R. Exh. 13 at 1–6.
[8] Tr. 182.
[9] Tr. 209.
[10] R. Exh. 6 at 20–30.
[11] Tr. 397–398.

ployment expired.

During her continuing search for work, Wright utilized the online job database listings maintained by the Florida State Department of Labor Unemployment Office. Later in 1995, Wright worked for Sylvia Whyte Mfg. Co., Inc. as a seasonal employee. She also returned to USPS in the hopes of securing permanent employment but, at the end of 1995, was again laid off.

From 1996 through the end of her backpay period, Wright worked for Mount Sinai Hospital. She discovered this job while working at USPS in late 1995. She continued to look for side jobs while employed full time by Mount Sinai.

Analysis and Conclusions

A discriminatee or other backpay claimant must mitigate damages by using "reasonable diligence in seeking alternative employment." *NLRB v. Mastro Plastics Corp*., supra at 175. The alternative employment must be "substantially equivalent to the position from which [the discriminatee] was discharged and is suitable to a person of [their] background and experience." *Southern Silk Mills*, 116 NLRB 769, 773 (1956), cited and quoted with approval in *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966). In determining the reasonableness of any individual's efforts, factors such as age, skills, qualifications, and the labor conditions in the area are appropriate for consideration. *Alaska Pulp Corp*., supra at 522; *Laredo Packing Co*., 271 NLRB 533, 556 (1984).

The test for mitigation is not success in obtaining employment but simply effort expended. A respondent must show both that the individual's job search efforts were unreasonable and that there were suitable jobs available for someone with the claimant's qualifications that a person undertaking a reasonable search would have secured. *Black Magic Resources*, 317 NLRB 721 (1995); *Lloyd's Ornamental & Steel Fabricators*, 211 NLRB 217, 218 (1974). The mere "existence of job opportunities by no means compels a decision that the discriminatees would have been hired had they applied." *Delta Data Systems Corp*., 293 NLRB 736, 737 (1989).

In order to successfully rebut a claimant's demonstration of mitigation, a respondent must affirmatively show that the individual claimant "neglected to make reasonable efforts to find interim work." *NLRB v. Miami Coca-Cola Bottling Co*., supra at 575–576. This standard is quite high, as the claimant is given considerable deference in his or her assertions. That is, a claimant does not have to show that he or she exerted Herculean efforts in searching for jobs. Rather, "it is sufficient that the discriminatee make a good faith effort" to find employment. *Delta Data Systems Corp*., 293 NLRB 736, 737 (1989); see also *NLRB v. Arduini Mfg. Co.,* 394 F.2d 420, 422–423 (1st Cir. 1968) (noting that the discriminatee is not held to the highest standard of diligence by only must make an "honest good faith effort to find suitable employment").

This standard is consistent with the presumption in favor of the claimant that runs throughout the calculation of backpay. Additionally, the Board has held that a claimant's faulty recollection, poor record keeping, or exaggeration of job search efforts does not prove a lack of reasonable diligence in seeking work. *December 12, Inc*., 282 NLRB 475, 477 (1986); *Laredo Packing Co*., supra at 556; *Arduini Mfg. Co*., 162 NLRB 972, 975 (1967). In essence, a respondent must prove that the claimant did not seek or refused to accept suitable employment. *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991); see also *Boilermakers Local 27*, 271 NLRB 1038, 1040 (1984) (finding the respondent "must affirmatively demonstrate that the employee neglected to make a reasonable effort to find interim work"). An employer does not meet its burden of proof by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings. *Food & Commercial Workers Local 1357*, supra; *Aircraft & Helicopter Leasing*, 227 NLRB 644, 646 (1976). In sum, success is not the test of reasonableness. *Bauer Group*, 337 NLRB 395, 396 (2002), quoting from *Minette Mills*, 316 NLRB 1009, 1010–1011 (1995).

A. Enrique Flores

In its brief, the Respondent asserts that the Region "only half-heartedly sought to locate Mr. Flores"[12] as an argument against backpay. On the contrary, I conclude that the Region's various efforts to locate Flores were more than sufficient to satisfy the requirements of the compliance manual guidelines.[13]

I further conclude that Flores is missing, despite reasonable measures taken by both the Region and the Respondent to locate him. Therefore, any backpay award granted to Flores will be subject to certain conditions, as set forth in the Order section below.

B. Isabel M. Martinez

As the Respondent argues, Martinez either perjured herself on the stand concerning her employment with the laundry, or she fraudulently misrepresented her employment history in order to secure a loan and employment.

As I noted, the information in the job application about the laundry job was detailed; setting forth her position, duties, salary, and supervisor. Taking this into account, as well as her evasiveness in answering questions concerning why she allegedly lied on the application and whether she or her daughter prepared it, I am persuaded that Martinez was employed on a cash-basis for the laundry from August 1994 through October 1995.

Although Martinez' credulity on that matter was lacking, the Respondent goes too far in asserting that it shows Martinez has a "penchant for dishonesty" and should be completely discredited. The Board has found that witnesses may be found partially credible, as the mere fact that a witness is discredited in one instance does not ipso facto mean that the witness must be discredited in all respects. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, it is appropriate to weigh the witness' testimony for consistency throughout with the evidence as a whole. Id. at 798–799; see also *MEM Electronic Materials*, 342 NLRB 1172, 1183 fn. 13 (2004), quoting *Americare Pine Lodge Nursing*, 325 NLRB 98 fn. 1 (1997) (noting that when examining testimony, a trier of fact is not required "to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says"); *Ex-*

[12] R. Br., at 9, par. 2.
[13] See Tr. 123.

cel Container, 325 NLRB 17 fn. 1 (1997) (stating that it is quite common in all kinds of judicial decisions to believe some, and not all, of a witness' testimony).

Thus, Martinez deception concerning the laundry job does not, standing alone, discredit her entire testimony. Other than in that one area, she appeared to be candid, and documentation supported her testimony regarding her searches for employment during the backpay period. Accordingly, I find that she was otherwise credible and that the Respondent has failed to meet its burden of showing that she did not properly mitigate backpay liability.

As to the laundry job, I will consider as interim earnings the amount Martinez made there, according to her job application,[14] and subtract it from her gross earnings, as follows. The application states that her starting salary was $120 per week, and her ending salary was $150 per week. Using the median figure of $135 per week, she earned $8775 in "under the table" gross payments during that employment. Because she would have earned substantially more than this had she remained in the Respondent's employ from August 1994 until October 1995,[15] Martinez is entitled to net backpay for such period.

C. Aundria D. McGregor

Overall, McGregor presented a clear, coherent picture of his job search efforts, and he regularly provided the Region with documentation. The record reflects that he consistently registered with temporary employment agencies and held numerous permanent positions. The Respondent contends, however, that McGregor's resignations from various jobs, job search efforts, and employment history are reasons for denying an award during the entire backpay period. For instance, the Respondent argues that McGregor's "unjustifiable resignation" from Florida Smoked Fish should disallow his backpay through June 1, 1995.[16]

McGregor's testimony reflects that he left jobs during the backpay period for two reasons: transportation issues (Fine Distributing, Inc. and South East Frozen Foods), and health concerns (Florida Smoked Fish, Jamo, Inc., and Carnival Fruit Company).

As Board law indicates, a claimant is not required to accept or retain interim employment that is substantially more onerous, is unsuitable, or threatens to become so. See, e.g.,*Chem Fab Corp.*, 275 NLRB 21, 24 (1985) (noting that the discriminatee's decision to quit after only 2 months an interim job that consisted of washing the soiled bed linen of elderly and disabled patients by hand was not unreasonable and did not limit his backpay award); *Lord Jim's*, 277 NLRB 1514, 1516 (1986) (holding that "there is no obligation to remain on a job that is substantially more onerous than the one from which that person was discharged").

Nor is a claimant required to accept or retain interim employment that entails greater exposure to environmental hazards or hardships that were not present when he or she worked for a respondent. See *Pope Concrete Products*, 312 NLRB 1171, 1173 (1993) (holding that interim employment that exposes a claimant to "working conditions which cause . . . severe hardship to the point where he could not tolerate the working environment without unbearable physical discomfort may not be held to be substantial equivalent employment"). Since McGregor was not required in the first place to accept jobs posing increased exposure to environmental hazards, his decision to stop working at such jobs for that reason cannot be held against him. See id. (finding that the duty to mitigate does not require claimant "to work under such dire circumstances when, had he remained in the employment of the Respondent," he would not have been exposed to such conditions). Therefore, I conclude that McGregor's quitting Florida Smoked Fish, Jamo, and Carnival Fruit should not diminish his net backpay.

I now turn to McGregor's leaving positions because of transportation difficulties, in particular, Fine Distributing. McGregor worked for Fine Distributing on three separate occasions. The first period was from approximately June 1, 1995, through February 8, 1996, at which time he was laid off.[17] Fine Distributing rehired McGregor on April 8, 1996, but he quit on or about June 1, 1996, because the company relocated from Miami to Broward County, and this negatively affected his commute due to what he characterized as tremendous difficulties in obtaining adequate transportation.[18] I conclude that his abandonment of his job at Fine Distributing at that time did not constitute a willful loss of employment, as the relocation created a substantially onerous condition of employment. See *Sorenson Lighted Controls*, 297 NLRB 282, 283 (1989) (noting that the Board has held that "a discriminatee who loses interim employment owing to a lack of transportation beyond that person's control has not engaged in a willful loss of earnings justifying the loss of backpay").

In April 1999, McGregor returned to Fine Distributing. He worked there until he once more quit, sometime later in the same calendar quarter. Again, he testified that he left because of problems with transportation.[19] However, McGregor's resumption of employment with Fine Distributing, at the same location where it had been when he previously quit, is inconsistent with the conclusion that he found the commute there onerous. I thus conclude that, by voluntarily returning with knowledge of what was involved in terms of transportation and then quitting a second time, McGregor unjustifiably abandoned interim employment and willfully accrued a loss of earnings.

Determining how this should impact on his net backpay is problematic, since there exists no clear formula on which to rely. I conclude that the most equitable approach is to modify his backpay award in the following manner: I will subtract from McGregor's total award the amount he would have earned had he remained at Fine Distributing through his registration with On Site Staffing (on or about September 29, 1999).[20] This period represents the time between jobs that should have been

[14] R. Exh. 15.
[15] Id.
[16] R. Br. at 13, 3.
[17] Tr. at 185–186.
[18] Tr. at 192–193.
[19] R. Exh. 4 at 209–210.
[20] R. Exh. 4 at 19-21.

occupied by continued employment at Fine Distributing.[21]

Aside from this aforementioned exception, I conclude that McGregor presented legitimate reasons for quitting the other jobs named above and that such resignations do not establish a reason to further limit his award of backpay. Accordingly, I conclude that the Respondent has not met its burden of showing that McGregor otherwise failed to mitigate damages.

D. Angelo O. Wilson

Wilson's reports to the Region, as well as her W-2 wage earnings records and tax returns, establish that she actively sought employment after being laid off and at times held two jobs. Although the Respondent argues otherwise, the fact that Wilson was employed by several different companies during the backpay period does not extinguish or diminish her backpay. See *Henry Colder Co.,* 186 NLRB 1088, 1090 (1970) (refuting such logic, the Board stated that to do so "would create the ridiculous anomaly whereby an assiduous and diligent backpay claimant would be penalized . . . whereas a shirker would be rewarded").

The Respondent disputes Wilson's claim that she searched unsuccessfully for substantially equivalent work for the 6 months following her layoff from the Respondent. However, the Respondent has failed to meet its burden of showing such.

I conclude that the Respondent has failed to meet its burden of showing that Wilson did not properly mitigate damages.

E. Altonia L. Wright

Wright's credible testimony demonstrates that she diligently searched for work by utilizing a variety of means, including responding to advertisements, going to a temporary employment agency, and utilizing the unemployment office on-line job database listings. Prior to securing full-time employment with Mount Sinai Hospital in 1996, she held a number of temporary or part-time positions. Her being laid off from several of those temporary jobs cannot be held against her. Accordingly, the Respondent has failed to meet its burden of demonstrating that she failed to mitigate damages. Once she obtained a full-time permanent position with Mount Sinai, she remained steadily employed there through the end of the backpay period.

In sum, other than what I have stated previously, I conclude that Martinez, McGregor, Wilson, and Wright satisfied their obligation to mitigate damages by making reasonably diligent searches for employment during the interim period and that the Respondent has failed to meet its burden of showing otherwise.

On the above findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

IT IS HEREBY ORDERED that the Respondent Parts Depot, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall pay the individuals named below the indicated amounts of total gross backpay and other reimbursable sums for the period from August 10, 1994 to April 4, or May 13, 2003, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment and minus tax withholding required by law.

Enrique Flores	$145,887.43
Isabel M. Martinez	72,664.40
Aundria D. McGregor	42,172.71
Angela O. Wilson	51,563.18
Altonia L. Wright	30,198.55
TOTAL	$342,486.27

IT IS FURTHER ORDERED, with respect to Flores, whom the record evidence shows to be a missing employee, that the Respondent pay the sum of his gross backpay award to the Region; such amount to be held in escrow in Flores' name for a period not to exceed 1 year from the later of either the date that the Respondent complies with this Decision by making such payment, or the date that the Board's Supplemental Decision and Order becomes final, including any enforcement thereof. During this time, Flores must come forward and contact the Region, at which point a hearing shall be conducted to calculate net backpay. Should Flores fail to contact the Region within this proscribed period, the funds deposited in his name will be returned to the Respondent and the backpay award shall lapse, unless Flores can demonstrate at a later date compelling reason for his failure to come forward within the escrow period.

Dated, Washington, D.C., November 10, 2004

[21] Id. McGregor reported earnings of $290 per week from Fine Distributing during this time. Id. I have calculated the total amount of time to be deducted as 19.5 weeks, which is comprised of the entire third quarter 1999 (13 weeks) during which time he was unemployed and half of the second quarter 1999 (6.5 weeks), as McGregor could not remember exactly when he quit his job, but knew that it was "sometime" in the second quarter. The total deduction, to be taken from the gross backpay award, is $5655.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the Board shall as provided in Sec. 102.48 of the Rules, adopt the findings, conclusions, and recommended Order and all objections to them shall be deemed waived for all purposes.